

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Application Serial No. 76/613881

For the Mark MANDARINE

Published in the Official Gazette JUNE 5, 2007

MINE DESIGN D/B/A/ OF AMAL FLORES
(U.S.),

Opposers,

v.

VOTIVO, LTD., a Washington corporation,

Applicant,

VOTIVO, LLC, a South Carolina Limited
Liability Company,

Defendant

APPLICANT'S AND DEFENDANT'S MOTION
FOR RECONSIDERATION OF CROSS-MOTION
FOR SUMMARY JUDGMENT

Opposition No. 91178747



10-09-2008

U.S. Patent & TMO/TM Mail Rpt 01

MOTION FOR RECONSIDERATION

Come now Applicant VOTIVO, Ltd., and Defendant VOTIVO, LLC (hereafter, collectively, "VOTIVO"), pursuant to Fed. R. Civ. P. 56(c) and 37 C.F.R. §2.127(b) and make this Motion for Reconsideration of the Board's September 19, 2008 Order denying VOTIVO's Cross-Motion for Summary Judgment. VOTIVO respectfully requests that Opposer Mine Design D/B/A Amal Flores's Opposition be dismissed. Opposer has no standing to oppose the subject mark MANDARINE because, among other grounds, it has been permanently enjoined from using MANDARINE as a mark in connection with any home or personal care products. Reconsideration of the Board's ruling is specifically requested with respect to the sole

ground cited by the Board for denying VOTIVO's cross-motion relating to Mine Design's lack of standing, i.e., that a question of fact exists with respect to whether the previous Settlement Agreement between the parties dismissed the federal district court lawsuit in which a Permanent Injunction against Mine Design was entered.

LEGAL AUTHORITY

The legal authority for this Motion for Reconsideration of Cross-Motion for Summary Judgment is set forth in VOTIVO'S Memorandum in Support of Motion for Reconsideration of Cross-Motion for Summary Judgment, filed contemporaneously herewith.

EVIDENCE

The evidentiary support for VOTIVO's Cross-Motion for Summary Judgment includes (1) the previously filed Declaration of Steven W. Edmiston in Opposition to Mine Design's Motion for Summary Judgment and in Support of Cross-Motion, and exhibits thereto, and (2) the pleadings and records otherwise on file herein.

RELIEF REQUESTED

VOTIVO requests that its Motion for Reconsideration of Order Denying Cross-Motion for Summary Judgment be granted, and Mine Design's Opposition be dismissed with prejudice.

DATED: October 9, 2008.

Respectfully Submitted,

INVICTA LAW GROUP, PLLC

By



Mark V. Jordan, WSBA No. 18461
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CERTIFICATE OF EXPRESS MAILING
37 C.F.R. §1.10

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Katy M. Albritton

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Mr. Carlos Candeloro
1601 N. Sepulveda Blvd. 239
Manhattan Beach, CA 90266


Katy M. Albritton

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

MINE DESIGN D/B/A/ OF AMAL FLORES
(U.S.),

Opposer,

v.

VOTIVO, LTD., a Washington corporation,

Applicant,

VOTIVO, LLC, a South Carolina Limited
Liability Company,

Defendant

APPLICANT'S AND DEFENDANT'S
MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION OF
CROSS-MOTION FOR SUMMARY
JUDGMENT

Opposition No. 91178747

Introduction

VOTIVO, LLC, successor in interest to VOTIVO, Ltd., (hereafter, "VOTIVO"), seeks to register the mark MANDARINE in standard character form for "bath salts and hand lotion" in International Class 3. Mine Design D/B/A Amal Flores ("Mine Design") oppose the registration. On September 19, 2008, the Board entered an Order denying cross-motions for summary judgment filed by the parties in this matter. VOTIVO hereby seeks reconsideration of that Order, and specifically, a single ruling by the Board:

In view of the discrepancy between the actions the parties appear to have agreed to take in the settlement agreement with regard to their district court litigation and the action that the parties took by way of the stipulation to dismiss the first civil action that they filed with the court of appeals, we find that there are genuine issues of material fact regarding whether, under the doctrine of *res judicata* or claim preclusion, opposer lacks standing to pursue this opposition. *In particular, there are genuine issues of material fact as to whether the settlement*

agreement is effective to dismiss the claims in the first civil action; and, if it is not, as to the effect of that agreement on the earlier permanent injunction.

See Order, p. 5-6 (emphasis supplied; for convenience, a copy of the Order is appended to this Memorandum as Exhibit 1). VOTIVO believes the Board erred in that it failed to consider a single, defined term contained within the Settlement Agreement between the parties: “*Lawsuits*.” This defined term resolves the above-referenced question of fact because its use in the Settlement Agreement clearly limits the scope of the subject dismissal to the then-pending matter before the court of appeals. The term “Lawsuits” as used provides absolute clarity with respect to the parties’ intent. As set forth below, the Settlement Agreement is therefore clear and unambiguous in that the parties did not intend to dismiss the pending federal district court action in which the Permanent Injunction had been entered against Mine Design. As such, Mine Design does not have standing to proceed with the Opposition.

Evidence

This Motion for Reconsideration is based upon the Trademark Trial and Appeal Boards’ September 19, 2008 Order in this matter; and the pleadings and records previously filed by the parties with respect to the cross-motions for summary judgment. More specifically, this Motion for Reconsideration will refer to the Settlement Agreement entered between the parties on May 5, 2006, which was appended as Exhibit 11 to the March 12, 2008, Declaration of Steve Edmiston (1) in Opposition to Opposer’s Motion for Summary Judgment and (2) in Support of Cross-

Motion. For convenience, a copy of the Settlement Agreement is attached to this Memorandum as Exhibit 2.

Facts

VOTIVO's Cross-Motion for Summary Judgment ("Cross-Motion") was filed on March 12, 2008. The Cross-Motion sought to dismiss Mine Design's Opposition based upon, among other grounds, Mine Design's lack of standing to oppose the subject registration for MANDARINE in standard character form for "bath salts and hand lotion" in International Class 3. The facts upon which this Motion for Reconsideration are based were previously set out in Applicant's and Defendants Memorandum (1) in Opposition to Opposer's Motion for Summary Judgment and (2) in Support of Cross-Motion, and are incorporated herein by this reference.

Argument

1. The Board's Order Denying VOTIVO's Cross-Motion for Summary Judgment.

In the Board's September 19, 2008, Order denying VOTIVO's cross-motion for summary judgment, the Board expressly considered "whether opposer's standing is barred under the doctrine of *res judicata* or claim preclusion." Order, p. 4. The Board recites the facts as follows:

While the second civil action was in the discovery period and opposer's appeal of the district court's entry of default judgment and permanent injunction against him to the United States Court of Appeals for the Ninth Circuit was pending in the first civil action, the parties entered into a settlement agreement. Under the terms of that agreement, the parties agreed to "dismiss their claims against [each] other" and that opposer would not use the MANDARINE mark so long as that mark remains registered.

Settlement Agreement at paragraphs 1 and 3. The parties filed a stipulation with the district court to dismiss "all claims and counterclaims" in the second civil action "with prejudice." However, the stipulation that the parties filed with the court of appeals in the first civil action sought dismissal of the appeal only and does not expressly ask that all claims in that case be dismissed.

Order, pp. 4-5. Based upon these facts, the Board denied VOTIVO's cross-motion for summary judgment:

In view of the discrepancy between the actions the parties appear to have agreed to take in the settlement agreement with regard to their district court litigation and the action that the parties took by way of the stipulation to dismiss the first civil action that they filed with the court of appeals, we find that there are genuine issues of material fact regarding whether, under the doctrine of *res judicata* or claim preclusion, opposer lacks standing to pursue this opposition. In particular, there are genuine issues of material fact as to whether the settlement agreement is effective to dismiss the claims in the first civil action; and, if it is not, as to the effect of that agreement on the earlier permanent injunction.

See Order, pp. 5-6. Clearly, the Board did not expressly, nor by inference, demonstrate that it considered the parties' use of the defined term "Lawsuits" with respect to assessing and resolving any question of fact that might otherwise exist relating to the scope of the dismissals contemplated by the Settlement Agreement.

2. The defined term "Lawsuits" clarifies that VOTIVO retained the right to enforce the Permanent Injunction and to prosecute any and all claims not released therein.

The Permanent Injunction was preserved in the Settlement Agreement and was not dismissed. In the Settlement Agreement, the parties were careful and precise. In

the Recitals of the Settlement Agreement, with respect to pending legal actions, the parties agreed to utilize a defined term, the “*Lawsuits*.” See Settlement Agreement, p. 1. The defined term “*Lawsuits*” includes only (1) a separate action also pending in California Federal District Court, *VOTIVO, Ltd. v. Amal Flores, d/b/a Mine Design*, case number CV-05-2942 (hereafter, “Mine Design II”); and (2) the U.S Court of Appeals (9th Cir.) Docket No. 06-55147 (the appeal arising from in the first federal litigation between the parties, (hereafter “Mine Design I Appeal”). Id.

It is not until the *next paragraph* in the Settlement Agreement that the parties *separately* addressed the entry of Judgment and the Permanent Injunction in *VOTIVO, Ltd. v. Mine Design*, Case No. CV 03-6017 (hereafter, “Mine Design I”). Id.

Section 1 of the Settlement Agreement provides that Mine Design and VOTIVO agreed “respectively to dismiss their claims against the other in the *Lawsuits*.” Id., p. 2 (emphasis supplied). Clearly, through the use of the term “*Lawsuits*,” the Mine I lawsuit, and specifically, the Permanent Injunction, were not included with the dismissal language.

The Board appears to have inadvertently omitted consideration of this all-important modifying language. The Board’s Order states: “Under the terms of that agreement, the parties agreed to ‘*dismiss their claims against [each] other*’ and that opposer would not use the MANDARINE mark so long as that mark remains registered.” Order, p. 5. The actual language from the Settlement Agreement in fact includes three critically important words, and reads: “*dismiss their claims against the other in the Lawsuits*.” Settlement Agreement, p. 2. (emphasis supplied).

By re-inserting the omitted modifying words “in the Lawsuits,” the scope and extent of what is to be dismissed is fully clarified: (1) the Mine II lawsuit in its entirety, and (2) the Mine I Appeal. This is *precisely* what the parties did in entering the dismissals.

Because the defined term “Lawsuits” completely clarifies the parties’ intention to dismiss only the Appeal and to preserve the Permanent Injunction, the remaining references in the Settlement Agreement to the Permanent Injunction are also clarified. Section 3 of the Settlement Agreement confirms the broad prohibition against Mine Design’s use of all of VOTIVO’s federally registered trademarks, including MANDARINE, as measured by the Permanent Injunction:

3. Use of VOTIVO Registrations. MINE agrees that it will not, directly or indirectly... use... (ii) any of the trademarks set forth in the Permanent Injunction provided such trademarks remain registered with the United States Patent and Trademark Office.

Id. Similarly, in Section 5, Mine Design represents and warrants that it “has not used or infringed any of the trademarks set forth in Permanent Injunction up until the effective date.” Id.

Perhaps most significantly, Section 11 of the Settlement Agreement provides for ongoing enforcement of the Permanent Injunction against Mine Design by expressly providing for the retention of jurisdiction by the Federal Court. Id.

Not surprisingly, in lockstep consistency with the Settlement Agreement, (1) a dismissal of the Mine I Appeal was in fact ultimately entered (See March 12, 2008, Edmiston Decl., Ex. 12); and (2) a dismissal of Mine II, case number CV-05-2942,

was entered (See March 12, 2008, Edmiston Decl., Ex. 13). No dismissal of Mine I, or the Permanent Injunction therein, was entered or contemplated by the parties.

Employing the defined term "Lawsuits," there is simply no remaining language in the Settlement Agreement that supports the argument that the Permanent Injunction was dismissed, and there is no evidence in the record that VOTIVO intended, as a result of executing the Settlement Agreement, to waive any of its rights to enforce the Permanent Injunction. If fact, the language within the Settlement Agreement requires the opposite conclusion. Reconsideration of the Board's Order is appropriate, and Mine Design's opposition should be dismissed.


RELIEF REQUESTED

WHEREFORE, VOTIVO requests that VOTIVO's Motion for Reconsideration be granted and Mine Design's Opposition be dismissed with prejudice.

DATED: October 9, 2008.

Respectfully Submitted,

INVICTA LAW GROUP, PLLC

By 


Mark V. Jordan, WSBA No. 18461
Steven W. Edmiston, WSBA No. 17136
Heather M. Morado, WSBA No. 35135
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Katy M. Albritton

Exhibit 1

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Baxley

Mailed: September 19, 2008

Opposition No. 91178747

Mine Design a d.b.a. of Amal
Flores

v.

Votivo, Ltd. and Votivo, LLC

Before Holtzman, Cataldo, and Ritchie de Larena,
Administrative Trademark Judges

By the Board:

Votivo, LLC, successor in interest to Votivo, Ltd.,
(collectively "applicant") seeks to register the mark
MANDARINE in standard character form for "bath salts and
hand lotion" in International Class 3.¹

¹ Application Serial No. 76613881, filed September 30, 2004 by Votivo, Ltd. ("Ltd."), based on an assertion of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. Section 1051(b). The application includes a statement that the English translation of the French word "MANDARINE" is "MANDARIN" and a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. Section 1052(f), based on its ownership of Registration No. 2728815 on the Principal Register for the same mark for related goods, namely, "skin soap, scented body spray, scented room spray, and incense," which was issued on June 24, 2003. During ex parte examination, Ltd. filed an amendment to allege use wherein it alleged January 7, 2005 as the date of first use anywhere and the date of first use in commerce. The application was published for opposition on June 5, 2007, and opposer filed his notice of opposition on August 3, 2007.

Mine Design a d.b.a. of Amal Flores ("opposer"), an individual, opposes registration of applicant's mark on grounds that the mark is "de jure functional" under Trademark Act Section 2(e)(5), 15 U.S.C. Section 1052(e)(5), and that it is generic for applicant's goods. In the answer thereto, applicant denied the salient allegations of the notice of opposition.² In addition, applicant asserted the following affirmative defenses: (1) that the notice of opposition "fails to state a claim upon which relief can be granted, and in particular, fails to state legally sufficient grounds for sustaining the opposition;"³ and (2) the opposition is subject to the doctrines of "res judicata and claim preclusion" because the involved mark was previously registered in Registration No. 2728815.

As an initial matter, with regard to the proposed functionality claim, we note that the mark at issue in this case consists entirely of wording in standard characters and that only utilitarian product features can be refused

² Ltd., the record owner of the involved application when this proceeding commenced, filed the answer in this proceeding on September 12, 2007. The involved application was assigned, along with Registration No. 2728815, to applicant in a document that was executed on September 28, 2007 and was recorded with the USPTO's Assignment Branch on October 31, 2007 at Reel 3650, Frame 0419. Applicant was joined as a party defendant in this case in a February 7, 2008 Board order.

³ We note, however, that the only context in which the Board will consider the sufficiency of opposer's pleading is a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Otherwise, such "affirmative defense" will be given on consideration.

registration on the ground that they are, as a whole, functional, under Trademark Act Section 2(e)(5), 15 U.S.C. Section 1052(e)(5). See TMEP Section 1202.02(a) (5th ed. 2007). Accordingly, the proposed claim that the mark is *de jure* functional is unavailable in this case, and paragraphs 29-32 of the notice of opposition are hereby stricken.

This case now comes up for consideration of: (1) opposer's motion (filed February 6, 2008) for summary judgment on his pleaded claim of genericness; and (2) applicant's cross-motion (filed March 12, 2008) for summary judgment on the grounds that opposer lacks standing to oppose registration of applicant's mark because opposer has been "permanently enjoined" from using the involved mark and because the opposition is barred by the doctrine of *res judicata* or claim preclusion and/or the doctrine of collateral estoppel or issue preclusion. The motions have been fully briefed.

Inasmuch as applicant's cross-motion for summary judgment is based on opposer's alleged lack of standing to pursue this opposition, we will consider the cross-motion first. We note initially that Ltd. did not set forth in its answer the affirmative defenses upon which it relies as bases for that cross-motion. We further note that opposer has objected to applicant's cross-motion on that basis and that applicant did not subsequently seek leave of the Board

to amend its answer to add such affirmative defenses.⁴ Accordingly, notwithstanding that opposer responded on the merits to the cross-motion for summary judgment, these unpleaded affirmative defenses may not serve as bases for summary judgment. See *Greenhouse Systems Inc. v. Carson*, 37 USPQ2d 1748, 1750 n.5 (TTAB 1995).

In any event, the record indicates that the parties were involved in two earlier civil actions: (1) Case No. CV 03-6017-DT, styled *Votivo, Ltd. v. Mine Design*, filed in 2003 in the United States District Court for the Central District of California; and (2) Case No. CV 05-2942-DT, *Votivo, Ltd. v. Amal Flores d/b/a Mine Design*, filed in 2005 in the United States District Court for the Central District of California. Because neither civil action was actually litigated, the doctrine of collateral estoppel or issue preclusion does not apply. See *Polaroid Corp. v. C & E Vision Services Inc.*, 52 USPQ2d 1954 (TTAB 1999).

We will next consider whether opposer's standing is barred under the doctrine of *res judicata* or claim preclusion. While the second civil action was in the

⁴ Opposer's contention that *Votivo, LLC* is in default because it did not file its own answer following its joinder as a party defendant herein is incorrect. As the assignee of the involved application, applicant stands in the shoes of assignor *Ltd.*, which timely files an answer. See *CBS Inc. v. Man's Day Publishing Company, Inc.*, 205 USPQ 470 (TTAB 1980). Accordingly, *Ltd.*'s answer serves as applicant's responsive pleading. The Board notes in addition that, in the February 7, 2008 order in which *Votivo, LLC* was joined as a party defendant, the Board did

discovery period and opposer's appeal of the district court's entry of default judgment and permanent injunction against him to the United States Court of Appeals for the Ninth Circuit was pending in the first civil action,⁵ the parties entered into a settlement agreement. Under the terms of that agreement, the parties agreed to "dismiss their claims against [each] other" and that opposer would not use the MANDARINE mark so long as that mark remains registered. Settlement agreement at paragraphs 1 and 3. The parties filed a stipulation with the district court to dismiss "all claims and counterclaims" in the second civil action "with prejudice." However, the stipulation that the parties filed with the court of appeals in the first civil action sought dismissal of the appeal only and does not expressly asks that all claims in that case be dismissed.

In view of the discrepancy between the actions that the parties appear to have agreed to take in the settlement agreement with regard to their district court litigation and the action that the parties took by way of the stipulation to dismiss the first civil action that they filed with the court of appeals, we find that there are genuine issues of

not set time for Votivo, LLC to file an answer because a new answer was unnecessary.

⁵ The permanent injunction, in relevant part, "permanently enjoined and restrained [opposer] from" using the involved MANDARINE mark "or any term ... that is confusingly or substantially similar" thereto on "any ... scented products for

material fact regarding whether, under the doctrine of *res judicata* or claim preclusion, opposer lacks standing to pursue this opposition. In particular, there are genuine issues of material fact as to whether the settlement agreement is effective to dismiss the claims in the first civil action; and, if it is not, as to the effect of that agreement on the earlier permanent injunction. In view thereof, applicant's cross-motion for summary judgment is denied.

We will next consider opposer's motion for summary judgment on the ground of genericness. With regard to opposer's standing to maintain this proceeding, we find that opposer has failed to meet his burden of showing that there is no genuine issue of material fact that he has a present or prospective right to use the term MANDARINE or its asserted equivalent "mandarin" descriptively or generically in his business. See *Binney & Smith Inc. v. Magic Marker Industries, Inc.*, 222 USPQ 1003 (TTAB 1984). Moreover, as to the merits, we find that opposer has failed to meet his burden of showing that there is no genuine issue of material fact that the involved MANDARINE mark or its asserted equivalent "mandarin" is understood by the relevant public

household or personal care use." Permanent injunction at paragraph 1(d).

primarily to refer to "bath salts and hand lotion."⁶ See *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). In view thereof, opposer's motion for summary judgment is denied.⁷

Proceedings herein are resumed. Discovery and testimony periods are reset as follows.

DISCOVERY PERIOD TO CLOSE: **October 10, 2008**

Plaintiff's 30-day testimony period to close: **January 8, 2009**

Defendant's 30-day testimony period to close: **March 9, 2009**

Plaintiff's 15-day rebuttal testimony period to close: **April 23, 2009**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

⁶ Applicant asserts in its brief in opposition to the motion for summary judgment and in support of its cross-motion for summary judgment that its involved mark is "suggestive" and "inherently distinctive." However, by seeking registration of the involved mark under Trademark Act Section 2(f), 15 U.S.C. Section 1052(f), applicant has conceded the mark's lack of inherent distinctiveness. See *Yamaha Int'l Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988).

⁷ The fact that we have identified only a few genuine issues of material fact as sufficient bases for denying the motions for summary judgment should not be construed as a finding that these are necessarily the only issues which remain for trial.

The parties should note that the evidence submitted in connection with their motions for summary judgment is of record only for consideration of those motions. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss &*

Opposition No. . .178747

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

Co. v. R. Josephs Sportswear Inc., 28 USPQ2d 1464 (TTAB 1993);
Pet Inc. v. Bassetti, 219 USPQ 911 (TTAB 1983).

Exhibit 2

Mine J

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is made by and between VOTIVO, Ltd., a Washington corporation ("VOTIVO") on the one hand, and Amal Flores d.b.a. Mine Design, a sole proprietorship ("MINE") on the other hand, and shall be deemed entered into on the "EFFECTIVE DATE," defined as the date upon which this Agreement is fully signed by, between and among VOTIVO and MINE ("the Parties").

RECITALS

WHEREAS, VOTIVO is also the owner of the following trademarks each of which are registered with the United States Patent and Trademark Office: Reg. Nos. 2,720,906 and 2,720,907 for RED CURRANT, Reg. Nos. 2,717,257 and 2,717,256 for SOKU LIME, and Reg. Nos. 2,717,259 and 2,717,258 for TALL GRASS (collectively, the "VOTIVO Registrations");

WHEREAS, the following two litigations pending between the Parties in federal court: (i) U.S. Court of Appeals (9th Cir.), Docket No. 06-55147; and (ii) District Court (C.D. Cal.), Case No. CV 05-2942 (the "Lawsuits");

WHEREAS, a Default Judgment and Permanent Injunction were entered in favor of VOTIVO and against MINE in the District Court (C.D. Cal.), Case No. CV 03-6017 (Exhibit A hereto) (the "Permanent Injunction");

WHEREAS, MINE has paid VOTIVO in full for the judgment entered in Case No. CV 03-6017, while reserving his rights on appeal, to collaterally attack the judgment and any other rights MINE may have against VOTIVO regarding said judgment (Exhibit B hereto);

WHEREAS, MINE has appealed the judgment in Case No. CV 03-6017 (U.S. Court of Appeals (9th Cir.) Docket No. 06-55147);

WHEREAS, Case No. CV 05-2942 is still in the discovery phase;

WHEREAS, both Parties desire to fully, completely and finally settle and compromise, in accordance with the terms set forth below, without the further cost, expense or continued litigation, the Lawsuit and the dispute between them;

NOW, THEREFORE, in mutual consideration for the promises, payments and other consideration in the Agreement it is hereby stipulated and agreed by the undersigned parties as follows:

AGREEMENT

1. Dismissal of Pending Suits. Upon execution of this Agreement by both Parties and payment as set forth in Section 2 below, MINE and VOTIVO, each agree, respectively to dismiss their claims against the other in the Lawsuits, without attorneys' fees or costs, by executing and filing the Stipulation of Dismissal in the form attached hereto as Exhibit C.
2. Payments. VOTIVO acknowledges receipt from MINE of \$20,166.00 remitted March 23, 2006, and accepts such payment in full satisfaction of the judgment entered Nov. 7, 2005 in Case No. CV 03-6017 and any other and all fees and costs associated therewith. MINE agrees to pay VOTIVO an additional \$3,000.00 within 15 days of the EFFECTIVE DATE.
3. Use of VOTIVO Registrations. MINE agrees that he will not, directly or indirectly, alone or in association with others, either as a principal agent, director, indirect owner, shareholder, partner, joint venturer or member, officer, director, employee, investor, consultant, manager or in any other capacity use (i) the VOTIVO Registrations or any confusingly similar words, terms, trademarks or trade names in connection with any of his products or services, or (ii) any of the trademarks set forth in the Permanent Injunction provided such trademarks remain registered with the United States Patent and Trademark Office. Finally, prior to introducing any

new product names, MINE agrees to perform a search of the records of the United States Patent and Trademark Office for any other registered or pending VOTIVO trademarks.

4. No Challenge to VOTIVO Registrations. MINE will not, directly or indirectly, alone or in association with others, initiate any proceeding challenging the protectability or validity of the VOTIVO Registrations.

5. Representations and Warranties.

a. VOTIVO represents and warrants that it fully and exclusively owns every cause of action, claim, demand, right or other matter that VOTIVO asserted in the Lawsuits; and that no other person or entity has or claims any interest in any such trademark, cause of action, claim, demand or right. VOTIVO further represents that it is under no obligation or legal disability that would prevent it from releasing said actions, claims, demands and rights, or from entering into this Agreement.

b. MINE represents and warrants that he fully and exclusively owns every cause of action, claim, demand, right or other matter that MINE asserted in the Lawsuits; and that no other person or entity has or claims any interest in any such trademark, cause of action, claim, demand or right. MINE further represents that he is under no obligation or legal disability that would prevent him from releasing said actions, claims, demands and rights, or from entering into this Agreement. MINE further represents that to his knowledge, except as set forth in the Lawsuits, he has not used or infringed any of the trademarks set forth in Permanent Injunction up until the EFFECTIVE DATE. For purposes of this Agreement, "knowledge" means such knowledge after due inquiry and reasonable investigation.

6. Mutual Releases. In exchange for good and valuable consideration, including the promises and commitments set forth in this Agreement, both Parties mutually agree to waive and

release any and all claims and/or liabilities the Parties may have against each other and their respective owners, officers, employees, directors, shareholders, agents, representatives, parent corporations, affiliates and subsidiaries, and the successors and assigns of any of them, including any and all demands, claims, rights, obligations, liabilities, causes of action, duties, debts, sums of money, promises, and accounts, of whatever kind, nature or description, direct or indirect, in law or in equity, in contract or tort or otherwise up until the EFFECTIVE DATE.

7. Release of Unknown Claims. The Parties understand that this agreement includes the release of certain types of unknown claims. The Parties acknowledge that they have had the opportunity to obtain advice of legal counsel and are familiar with California Civil Code Section 1542, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

Having been fully informed of the provisions of California Civil Code Section 1542, the Parties nevertheless hereby waive and release any rights that the Parties may otherwise have to dispute the scope of this agreement on the ground of said code section.

8. Notice of Trademark Rights.

a. After the EFFECTIVE DATE, in each instance VOTIVO or any of its successors in interest in good faith believes MINE or any of its successors in interest is using a term in connection with the sale of goods for which VOTIVO has a valid and subsisting federal trademark registration ("the OFFENDING TERM"), VOTIVO shall inform MINE in writing as set forth in Section 23 below of such claim ("WRITTEN NOTICE"). MINE shall have 30 days from the NOTICE DATE ("the GRACE PERIOD") to respond to said WRITTEN NOTICE. Provided MINE complied with its obligations as set forth in Section 3 above, VOTIVO shall not

bring suit, and shall recover no damages, attorneys' fees or any other costs for activity that occurred up until the date by which MINE's response was due if MINE during said GRACE PERIOD (a) changes the OFFENDING TERM on its products, catalogs, etc., with an acceptable substitute term ("SUBSTITUTE TERM") or (b) provides VOTIVO with reasonable assurances that MINE has otherwise discontinued its use of the OFFENDING TERM.

b. VOTIVO shall have the right to bring a trademark infringement suit against MINE only if, after 30 days have elapsed from the NOTICE DATE,:

- (i) the Parties cannot reasonably agree on a SUBSTITUTE TERM;
- (ii) MINE has not provided VOTIVO with reasonable assurance that MINE has otherwise discontinued its use of the OFFENDING TERM; or
- (iii) MINE does not respond to the WRITTEN NOTICE within the GRACE PERIOD.

9. Entire Agreement. This Agreement constitutes the entire understanding and agreement between the parties respecting the settlement of all demands, claims, rights, obligations, liabilities, causes of action, duties, debts, sums of money, promises, or accounts between the Parties up until the EFFECTIVE DATE, and supersedes all other agreements, express or implied, between the Parties respecting its subject matter. This Agreement may not be changed or modified, except by a writing signed by the parties hereto.

10. Covenant Not To Sue. Each Party hereto and their respective representatives covenants and agrees that they will forever refrain and forebear from bringing, commencing or prosecuting any action, lawsuit, claim, or proceeding against the other Party hereto based on any claim, debt or obligation of any kind that is released or discharged herein.

11. Consent to Jurisdiction. This Agreement will be governed by and construed under the laws of the State of California. The Central District of California will retain jurisdiction for the purpose of enforcing this Agreement.

12. Consultation with Counsel. The Parties acknowledge that each of them has consulted with, or had the opportunity to consult with, legal counsel of their own selection about this Agreement and the releases contained herein, including California Civil Code Section 1542. The Parties each understand that this Agreement will affect their legal rights, and voluntarily enter into this Agreement with such knowledge and understanding. Each of the Parties warrants and represents that the person signing the Agreement on behalf of that party has full authority to do so.

13. Severability. The Parties agree that if any part, term, or provision of this Agreement shall be found illegal or in conflict with any valid controlling law, the validity of the remaining provisions shall not be affected thereby.

14. Headings, Exhibits and Pronouns. Section headings and pronouns contained in this Agreement are for convenience only and shall not be considered for any purpose in construing the Agreement. The exhibits hereto shall be construed with and as an integral part of this Agreement to the same effect as if the contents thereof had been set forth verbatim herein.

15. Assignment. This Agreement shall be binding upon and inure to the benefit of the Parties' successors and assigns.

16. No Waiver. Any waiver by a Party of any term of this Agreement shall not be deemed a waiver of any other term. No term of this Agreement may be waived except by a written waiver signed by the waiving Party.

17. Integration. This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter hereof and fully supersedes any and all prior understandings, representations, warranties and agreements between the Parties pertaining to the subject matter hereof. This Agreement may not be explained or supplemented by evidence of consistent additional terms or contradicted by evidence of any prior or contemporaneous agreement. The recitals set forth above are incorporated in this Agreement as if fully set forth herein.

18. Mutual Drafting. The Parties agree that this Agreement has been drafted by and is the product of both Parties and that it is the intention of the Parties that this Agreement shall not be construed against either Party based on the assumption or premise that one Party or the other was the drafter of the Agreement.

19. Modification. The Parties agree that any amendments or modifications to this Agreement shall be deemed null and void unless such amendments and modifications are in writing, specifically refer to this Agreement, and are signed by authorized representatives of all Parties.

20. Costs. Each Party will bear its own costs, expenses and attorneys' fees.

21. Authority to Sign. Each signatory to the Agreement represents and warrants that s/he has the necessary authority to bind such Party to the terms contained herein.

22. Counterparts. This Agreement may be executed in counterparts and by facsimile, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

23. Notice. Any written notice required or permitted to be given under this Agreement shall be sufficient if sent by facsimile or overnight mail to the other party at the addresses shown below, and shall be deemed given as of the day after the date so sent. Although

notice is to be given in writing, the parties agree to make a good-faith effort to telephone applicable counsel when notice is being given.

For VOTIVO: VOTIVO, LTD.
3450 4th Avenue S.
Seattle, WA 98134
Attn.: Mr. Edgar F. Lee

With a copy to: INVICTA LAW GROUP, PLLC
1000 Second Avenue, Suite 3310
Seattle, Washington 98104-1019
Attn.: Mr. Mark V. Jordan

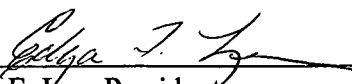
For MINE: MINE Design
11151 Mississippi Ave.
Los Angeles, CA 90025
Attn.: Amal Flores

With a copy to: Carlos Candeloro
1601 N. Sepulveda Blvd. 239
Manhattan Beach, CA 90266
or
carlos@candeloro.net

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date written below and on behalf of the parties listed with their respective signatures.

VOTIVO, LTD.

Date: May 1, 2006

By: 
Edgar F. Lee, President

Date: 5/5/06


Amal Flores d.b.a. Mine Design